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No. 91-631

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT CASELLA, et al.,
Petitioners,

vs.

THE CITY OF MORGAN HILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the state court was correct in ruling that the City of Morgan Hill's Mobilehome Rent Stabilization Ordinance did not constitute a taking under the California Constitution, Article I, Section 19, despite the existence of two federal court of appeal decisions which held that similar ordinances constituted a physical taking under the United States Constitution.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners Robert Casella, Mary Jo Casella, Billy Baxley, Clara Baxley, Donald Wetterstrom, Indianola Wetterstrom, Allan C. Roman, Jackie Roman, collectively a California General Partnership d/b/a Hacienda Valley Mobile Home Estates and Respondent City of Morgan Hill, a Municipal Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 5

California Constitution 5

Morgan Hill Ordinance 5

California Statutes 7

STATEMENT OF THE CASE 8

The State Superior Court Action 8

The State Court Appeal 9

The State Supreme Court Denial 14

The Federal Case 14

DENIAL OF THIS WRIT IS APPROPRIATE. HOWEVER, IF THE WRIT IS GRANTED, THE JUDGMENT BELOW SHOULD BE AFFIRMED 16

I. THE COURT OF APPEAL FULLY CONSIDERED AND CORRECTLY RULED ON CASELLA'S TAKING CLAIM 19

A. THE FEDERAL STANDARD FOR DECIDING TAKINGS CLAIMS IS EMBODIED IN UNITED STATES SUPREME COURT DECISIONAL LAW 21

B. THE *HALL V. CITY OF SANTA BARBARA* CASE DOES NOT REFLECT THE APPLICABLE FEDERAL STANDARD 27

C. THE *HALL* RATIONALE HAS BEEN UNDERMINED BY SUBSEQUENT CASES 30

1. The *FCC* Decision Undermined The *Hall* Panel's Rationale. 30

2. *Pennell* Rejected Arguments From *Hall* That Rent Control Was A Per Se Taking. 31

3. The Connecticut Supreme Court Has Rejected The *Hall* Rationale. 32

4. A Mere Loss Of Money Is Not A Physical Taking. 35

D. THE THIRD CIRCUIT'S DECISION IN *PINEWOOD* IS NOT PERSUASIVE BECAUSE IT FAILED TO CONSIDER BINDING AND RELEVANT AUTHORITIES 38

E. THE *HALL* RATIONALE SHOULD NOT BE EXTENDED 41

F. THE CITY'S RENT STABILIZATION ORDINANCE WAS ENACTED AS A REASONABLE EXERCISE OF THE POLICE POWER TO CONTROL EXCESSIVE RENT INCREASES FOR MOBILEHOME PARK RESIDENTS 47

CONCLUSION 51

TABLE OF AUTHORITIES

Cases

Azul Pacifico v. City of Los Angeles, 740 F. Supp. 772 (C.D. Cal. 1990), *appeal docketed*, No. 90-55853 (9th Cir. 1991) 48, 49, 50

Cardinale v. Louisiana, 394 U.S. 437, (1969) 18

Casella v. City of Morgan Hill, 230 Cal. App. 3d 43, 280 Cal. Rptr. 876 2, 10

Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.*, 489 U.S. 1002 (1989) 32, 33, 34, 35, 39, 40

FCC v. Florida Power Corp., 480 U.S. 245 (1987) 30, 31, 32, 33, 39

Fisher v. City of Berkeley, 471 U.S. 1124 (1985) 29

Fresh Pond Shopping Center v. Callahan, 464 U.S. 875 (1983) 29, 33

Hall v. City of Santa Barbara,
833 F.2d 1270 (9th Cir. 1986),
cert. den., 485 U.S. 5940 (1988)
8, 10, 13, 21, 27, 28, 29,
33, 38, 41, 42, 43, 44, 46, 50, 51

Illinois v. Gates,
462 U.S. 213 (1983),
reh'g denied; 463 U.S. 1237
17, 19

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982)
11, 23, 24, 25, 25, 28,
29, 31, 33, 36,37, 38, 39, 40

Nash v. City of Santa Monica,
470 U.S. 1046 (1985)
29

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978)
22, 27

Pennell v. City of San Jose,
485 U.S. 1 (1988)
31, 51

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922)
21

People v. Bradley,
1 Cal.3d 80, (1969)
19

Pinewood Estates of Michigan v. Barnegat Township,
898 F.2d 347 (1990)
21, 38, 39, 40

Sierra Lakes Reserve v. City of Rocklin,
938 F.2d 951 (9th Cir. 1991)
41

Tacon v. State of Arizona,
410 U.S. 3521 (1973)
18

United States v. Sperry Corp.,
493 U.S. 52 (1989)
34, 37, 40

Webb v. Webb,
451 U.S. 493 (1981)
5, 18, 19

Yee v. City of Escondido,
224 Cal .App. 3d 1349,
cert. granted, (No. 90-1947)
11

Constitutional Provisions, Statutes and Rules

28 U.S.C. Section 1257 3

California Constitution,
Article I, Sec. 19 5

California Mobilehome Residency Law (Cal. Civ. Code, §§ 798-799.49)
7, 43, 45

Morgan Hill Ordinance Mobilehome Rent Stabilization Ordinance 43, 47

Texts and Miscellaneous Material

Manheim "Tenant Eviction Protection and the Takings Clause" 1989 Wisconsin Law Review 925 at 955-956 n.179 46

9 Witkin, *California Procedure*, "Appeal", Section 781 20

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Morgan Hill ("City") respectfully requests that this

Court deny Petitioners, Robert Casella, et al.'s ("Casella") Petition for Writ of Certiorari seeking review of the Sixth Appellate District California Court of Appeal decision in this case. In the alternative, City respectfully requests that the Court either summarily affirm the judgment entered by the state court that the challenged vacancy control provision of the Mobilehome Rent Stabilization Ordinance does not constitute a taking under the California Constitution, or summarily dismiss for want of a substantial federal question.

OPINIONS BELOW

On November 27, 1989, the Santa Clara County Superior Court, trial court for the State of California, sustained City's demurrer to Casella's complaint and Granted Plaintiffs 30 days leave to amend their complaint. Casella elected not to

amend and moved for Entry of Dismissal of the Complaint which was granted and entered on February 15, 1990. A copy of this order is included as Appendix C to the Petition for Writ of Certiorari.

On May 10, 1991, the Sixth Appellate District of the California Court of Appeal issued its opinion affirming the dismissal of the complaint. The opinion is reported at 230 Cal. App. 3d 43, 280 Cal. Rptr. 876. A copy of the opinion is included as Appendix A to the Petition for Writ of Certiorari.

On July 17, 1991, the California Supreme Court issued an order denying Casella's Petition for Review. A copy of the Order is included as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

Casella has invoked the Court's jurisdiction under 28 U.S.C. Section 1257

apparently under the provision which allows review "where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."

The complaint filed by Casella in the state trial court did not allege a violation of the United States Constitution. Casella declined the offered opportunity to amend the complaint to include additional allegations or claims. The state appellate court decision affirming dismissal of the complaint is based on California Constitutional Law. Because Casella failed to properly raise federal constitutional issues in the state court at the trial level, Casella should be barred from raising them now. Petitioners cannot show that the federal claim was

adequately presented in the state system and hence the Supreme Court does not have jurisdiction. (*See Webb v. Webb*, 451 U.S. 493 (1981).)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[1]

California Constitution

The California Constitution, Article I, Sec. 19, provides:

> Private property may be taken or damaged for public use only when just compensation... has first been paid to, or into court for, the owner.

Morgan Hill Ordinance

The Mobilehome Rent Stabilization

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[1]Although Petitioners have set forth the Fifth Amendment to the United States Constitution as one of the Constitutional provisions involved, the state court complaint did not allege a federal constitutional violation, nor was this issue specifically addressed at the court of appeal level.

Ordinance challenged in this lawsuit regulated the amounts which could be charged for rental of the space upon which mobilehomes are placed. That ordinance further provided that upon transfer of ownership of a mobilehome which was to remain in the mobilehome park, the space rent could only be increased by a one-time administrative fee of twenty-five dollars ($25.00). This provision is described herein as "vacancy control."

On October 4, 1989, Ordinance No. 940 was enacted by City which eliminated any restrictions on the amount which could initially be charged to a purchaser of a mobilehome within the mobilehome park. Enactment of this ordinance mooted petitioners' claims for injunctive relief against further enforcement of the vacancy control provision.

California Statutes

The California Mobilehome Residency Law (Cal. Civ. Code, §§ 798-799.49) governs many aspects of the relationship between mobilehome park owners and the mobilehome owners residing on the rented spaces within the park. The legislative justification for the unique protections provided mobilehome owners is set forth in the statute. Protections include restrictions on terminating a space tenancy, and restrictions preventing a park owner from interfering with or preventing the sale of a homeowner's mobilehome to a new purchaser as long as the prospective buyer has the financial ability to pay the space rent and does not have a prior history of non-compliance with mobilehome park rules and regulations.

STATEMENT OF THE CASE

The State Superior Court Action

On August 30, 1989, Casella filed a complaint in Santa Clara County Superior Court challenging the vacancy control provision of the City of Morgan Hill's Mobilehome Rent Stabilization Ordinance as a violation of the California Constitution Article I, Section 19. Casella relied primarily on the case of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. den.*, 485 U.S. 5940 (1988), claiming that a rent control ordinance containing a vacancy control provision effectuated a physical taking of the plaintiff's property in violation of the Fifth Amendment to the United States Constitution. Casella's complaint sought damages in the amount of $5,000,000, attorney's fees and costs.

On October 17, 1989, the City of

Morgan Hill filed a demurrer to the complaint on the grounds that Casella had failed to state sufficient facts to state a cause of action.

On November 27, 1989, after hearing on the matter, the superior court granted City's demurrer and gave Casella thirty days leave to amend the complaint.

Casella elected not to amend the complaint thereby voluntarily giving up the opportunity to amend to include an allegation that the ordinance violated the United States Constitution. A dismissal was entered on February 15, 1990.

The State Court Appeal

Casella filed a timely notice of appeal of the superior court dismissal to the Sixth Appellate District Court of Appeals of the State of California. Although Casella argued in its appellate court briefs that the ordinance violated

both the California and United States Constitutions, City argued in its brief that the complaint did not allege a cause of action for taking under the United States Constitution.

On May 10, 1991, in a decision reported as *Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 280 Cal. Rptr. 876, the court of appeals affirmed the trial court's dismissal of the case. The court concluded that the pleadings failed to state facts sufficient to constitute a taking and rejected Casella's argument that a contrary result was required by the decision of the Ninth Circuit Court of Appeals in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. den.*, 485 U.S. 5940 (1988). (Appendix A to Petition, pages A-1 - A-2). The state appellate court held that an economic regulation such as the challenged rent

control measure could not metamorphose into a physical occupation such as that involved in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and similar cases. The court noted that its decision was consistent with *Yee v. City of Escondido*,[2] 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990).

The state appellate court ruled that in the absence of allegations that the challenged ordinance prevented a fair and reasonable return on the owners' investment or that owners had been denied economically viable use of their land, the court could not find, under any construction of the facts, that a claim for taking without just compensation had been plead.

It is important to note that the

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[2]Yee v. City of Escondido has been accepted for review by this Court and bears Supreme Court Docket Number 90-1947.

state appellate ruling was based, at least in part, on the unique procedural history of this case. The court stated:

> Where the trial court sustains a demurrer with leave to amend but the plaintiff elects not to amend, there is a presumption that the plaintiff has stated as strong a case as he or she can. In such instances, in determining whether the trial court has abused its discretion, the appellate court must resolve all ambiguities and uncertainties raised by the demurrer against the plaintiff; if the complaint is objectionable on any ground raised by the demurrer the judgment of dismissal must be affirmed.
>
> (Appendix A to Petition for

Writ pages A-10 - A-11.)

The state appellate court did not purport to overrule the Ninth Circuit's decision in *Hall*, it simply declined to accept the rationale of *Hall* in applying California Constitutional Law to the allegations of the complaint. There is no indication that the court intended to adjudicate Casella's claims under the United States Constitution. Although the court did set forth the terms of the Fifth Amendment to the United States Constitution at page 13 of the Opinion, the terms are juxtaposed next to a statement about the similarity between the Fifth Amendment and Article I, Section 19 of the California Constitution.

In their Petition for Writ of Certiorari Casella has failed to point to any other language in the Opinion which supports the contention that the state

court was actually ruling on federal constitutional grounds. It is submitted that mere citation to the Fifth Amendment does not indicate that the state court adjudicated federal constitutional issues when only state constitutional issues were properly before the court based on the complaint filed by Casella.

The State Supreme Court Denial

On July 17, 1991, the California Supreme Court denied Casella's Petition for Review and also denied Casella's request for an order directing de-publication of the opinion. (Appendix B to Petition For Writ.)

The Federal Case

The federal case is not the subject of this Petition for Writ of Certiorari. Casella's recitation of the procedural history and arguments presented therein is

not germane to this matter.[3] City submits that Casella's request that the federal district court be ordered to take jurisdiction over the federal case is not properly raised in this petition for Writ of Certiorari for review of the state court judgment. If Casella objects to the decision of the federal district court, their recourse lies through appeal to the Ninth Circuit Court of Appeal, not through collateral insinuation into this Petition for Writ of Certiorari.

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[3]Casella's argument that "The Federal Claim Did Not Even Exist At The Time The State Court Purported To Dispose Of It" (Petition for Writ page 28-31) undercuts their assertion, necessary to this Petition, that the state court ruled on the federal constitutional issues. The argument that the federal constitutional issues were unripe is inconsistent with Casella's assertions that they properly raised these claims in the state court action.

DENIAL OF THIS WRIT IS APPROPRIATE. HOWEVER, IF THE WRIT IS GRANTED, THE JUDGMENT BELOW SHOULD BE AFFIRMED

City urges that this Petition For A Writ Of Certiorari be denied, or in the alternative, the judgment below be summarily affirmed. In their questions presented section, Casella seriously misstates the issues which are purportedly before the court. Question one states in part "Was it error for the state appellate court to disregard the (federal court) rulings and hold that there was no taking under the fifth and fourteenth amendments?" Casella's state court complaint only alleged a violation of the California Constitution and did not allege a violation of the United States Constitution. The state appellate court opinion does not purport to rule on

federal constitutional issues. Casella's efforts to seek United States Supreme Court Review of the validity of the state appellate court's holdings with regard to federal law when no such holdings are present in the published opinion should be summarily denied as entirely lacking any merit. Where, as here, it is not clear from the record that a federal question has been both raised and decided in the state court, jurisdiction of the Supreme Court is not warranted. *Illinois v. Gates*, 462 U.S. 213 (1983), *reh'g denied*; 463 U.S. 1237.

Casella lists as question presented number two whether the ordinance constituted a violation of substantive due process. This issue, based on the United States Constitution, was first raised by Casella in their appellate court reply brief to which City did not have an

opportunity to respond. City submits that this issue, not properly raised below, is not a proper issue for this Court's determination. *Webb v. Webb*, 457 U.S. 493 (1981). Casella's question number three relating to the ripeness of the federal claim is an issue which was not presented below at any stage of the state court proceedings. Because this Court has traditionally refused to decide federal constitutional issues raised for the first time on review of state court decisions (*See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. State of Arizona*, 410 U.S. 3521 (1973); summary denial of this petition is warranted.

The California state court judgment which is the subject of this petition did not decide a federal question in a way that conflicts with the decision of a United States Court of Appeals because the

decision was based on the California Constitution. Casella has failed to properly show from the record that the federal question was both properly raised and decided in the state court actions. For this reason, review is not warranted pursuant to Supreme Court Rule 10(b). (*See, e.g. Illinois v. Gates*, 462 U.S. 213 (1983), *reh'g denied*, 463 U.S. 1237; *Webb v. Webb*, 451 U.S. 493 (1981).)

I. THE COURT OF APPEAL FULLY CONSIDERED AND CORRECTLY RULED ON CASELLA'S TAKING CLAIM

Contrary to Casella's assertion that state courts are bound to follow federal law in determining federal issues, (see Petition for Writ pages 34-35) decisions of lower federal courts are not binding on the courts of California, even on federal questions (*People v. Bradley* 1 Cal.3d 80, 86 (1969).) The decisions of lower

federal courts, including the Ninth Circuit Court of Appeals, while persuasive on matters of federal law are not binding on California courts. They do have the same value as decisions of other state courts, i.e. well-considered decisions are persuasive. (*See* 9 Witkin, *California Procedure*, "Appeal", Section 781.)

Casella contends that the state appeals court "erred in determining federal rights under the Fifth and Fourteenth Amendments in contravention of the entire published federal case law on point." (Petition for Writ page 34.) Assuming for purposes of argument that the state court did determine the federal constitutional issues involved, City submits that the state appellate decision is based on a well-reasoned analysis of existing federal takings law as set forth in the Opinion pages 13-41 of Exhibit A to

Petition. Failure to follow the Ninth Circuit decision in *Hall v. City of Santa Barbara*, or the Third Circuit decision in *Pinewood Estates of Michigan v. Barnegat Township*, 898 F.2d 347 (1990) is not a flagrant disregard of federal law on the subject.

A. THE FEDERAL STANDARD FOR DECIDING TAKINGS CLAIMS IS EMBODIED IN UNITED STATES SUPREME COURT DECISIONAL LAW

The Fifth Amendment to the United States Constitution, applicable to the states through the due process clause of the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. Initially, courts construed the just compensation clause to apply only when the state physically occupied private property. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Oliver

Wendell Holmes expanded the understanding of what constituted a taking by declaring that a regulation which goes too far will be recognized as a taking. However, the courts use a significantly different analysis when the allegations of the complaint are based on a regulatory rather than a physical taking.

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), is an example of the regulatory line of cases where the value or usefulness of plaintiff's property is diminished by governmental regulatory action although there is no physical occupation of the property. Under a regulatory takings analysis a multi-factor balancing approach is employed rather than a set formula. The economic impact of the regulation and especially the extent to which the regulation interferes with the reasonable

investment backed expectations of the owner, holds particular significance. The character of the governmental action is also weighed in the balance.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) is an example of the physical occupation line of cases where the government physically intrudes upon plaintiff's property. In the case of an actual physical occupation, a taking will be found "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners." (*Loretto, Id.* at 434-435). The *Loretto* opinion emphasized that its holding was "very narrow" (*Id.* at 441) and indicated that it would not impair the government's power to regulate landlord-tenant relationships (*Id.* at 440). The Court stated "so long as [government] regulations do not require

the landlord to suffer the physical occupation of a portion of his buildings by a third party, they will be analyzed under the multi-factor inquiry generally applicable to non-possessory governmental activity." (*Ibid.* at 440.)

Justice Blackmun authored a dissenting opinion in *Loretto* with Justices Brennan and White joining. Justice Blackmun analyzed past Supreme Court cases and found no basis in the law for applying a different test dependent on whether or not a permanent physical occupation was alleged. Justice Blackmun wrote:

> In sum, history teaches that takings claims are properly evaluated under a multi-factor balancing test. By directing that all "permanent physical occupations" automatically are

> compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners." ante, at 434-435, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its per se rule.
> (*Loretto*, 458 at 451)

As Justice Blackmun foretold, Petitioners herein have attempted to shoehorn insubstantial takings claims into the set formula for a physical taking (*Ibid.*) Based on the Majority's discussion in *Loretto*, responding to the dissenters' concerns, City submits that the per se taking standard is only appropriate where there has been an actual physical invasion of the property by a

third person of the sort which is visible and/or tangible. The Court, in explaining the distinctions between a permanent physical occupation and other takings, stated "Whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." (*Loretto*, 458 at 437.)

The type of physical occupation alleged by Casella in their complaint does not fit within the narrow holding of *Loretto*. The alleged physical occupation is not a readily discernable placement of a fixed structure on the owner's property by a third party. The physical occupation alleged here is more a metaphysical economic analysis of the impact of a successor tenant. Because the taking

alleged here cannot fit within the very narrow holding of *Loretto*, Supreme Court precedent requires that the multi-factored balancing test described in *Penn Central*, 438 U.S. 104 (1978), be applied.

B. THE *HALL V. CITY OF SANTA BARBARA* CASE DOES NOT REFLECT THE APPLICABLE FEDERAL STANDARD

The Ninth Circuit Court of Appeals in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (1986), reviewed United States Supreme Court precedent and, based on an interpretation thereof, determined that if the allegations of the complaint were proven true, the Santa Barbara Ordinance, in effect, acted to cause a physical occupation of the mobilehome park owner's property. The *Hall* court viewed the effect of the ordinance as a permanent physical occupation. The traditional regulatory takings multi-factored

balancing test was not applied, and a per se cause of action for taking was found to be viable. The federal standard purportedly applied in *Hall* was that handed down by the Supreme Court in *Loretto* and cases cited therein.

The *Hall* opinion acknowledges that there are no absolute rules in determining whether a taking has occurred. It was observed that the Supreme Court itself had been unwilling to provide any hard and fast rules to determine issues in this sensitive area. (*Hall*, 833 F.2d at 1278.) In the face of this, Casella maintains that *Hall* provides the definitive ruling on this issue and that any city rent control ordinance which is similar in effect to the Santa Barbara Ordinance qualifies as a permanent physical occupation for which compensation must be paid.

The dissenting opinion in *Hall* from the denial of an en banc hearing states "The ordinance at issue is in all material respects identical to three rent regulation challenges that the Supreme Court dismissed in recent years as lacking a substantial federal question. (*Fisher v. City of Berkeley*, 471 U.S. 1124 (1985); *Nash v. City of Santa Monica*, 470 U.S. 1046 (1985); and *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875 (1983).) The panel decision is thus contrary to controlling authority." (*Hall*, dissent 833 F.2d at 1281.) The dissenting opinion criticized the reasoning in *Hall* observing that *Loretto* made clear the distinction between permanent physical occupations and regulations impairing use or even causing a temporary injury to the property. The dissent states: "The hallmark of the physical invasion described in *Loretto* is

actual appropriation of the land itself through physical contact ... " (*Id.* at 1283.) The dissent argues that the *Hall* analysis that economic regulation can shade into physical invasion is antithetical to the reasoning of *Loretto*.

C. THE *HALL* RATIONALE HAS BEEN UNDERMINED BY SUBSEQUENT CASES

1. The *FCC* Decision Undermined The *Hall* Panel's Rationale.

Subsequent to the *Hall* panel decision, the Supreme Court decided *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). In *FCC*, a public utility argued that a federal statute, which authorized the FCC to determine the rate which it could charge a cable TV system for the use of its poles, constituted a "taking." The Court disagreed and pointed out that the statute did not require the utility to rent its poles but merely regulated the

rents it charged once it had decided to rent (*FCC*, 480 U.S. at 251). After pointing out that "statutes regulating the economic relations of landlords and tenants are not per se takings" and citing the *Fresh Pond* rent control decision, the Court dismissed the contention that the rent regulation was a "taking". (*Id.* at 252.)

2. *Pennell* Rejected Arguments From *Hall* That Rent Control Was A Per Se Taking.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court upheld San Jose's rent control ordinance, and refused to declare rent control a per se taking. Chief Justice Rehnquist wrote:

> We stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, [citation] that we 'have broad power to regulate housing

conditions in general and the landlord/tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' [citations] And in *FCC v. Florida Power Corp.*, [citation] we stated that 'statutes regulating the economic relations of landlords and tenants are not per se takings. [citations.]' (485 U.S. at 14 n.6.)

3. The Connecticut Supreme Court Has Rejected the *Hall* Rationale.

In *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.*, 489 U.S. 1002 (1989), the state court held that the modification of a lessor's common law right to absolute control over the lease term and identity

of the lessee effectuated by the challenged mobilehome rent control ordinance was not sufficiently analogous to a physical occupation to constitute a taking. The Court examined the *Hall* rationale and rejected its reasoning. The Connecticut Court also determined that there were significant differences between the Connecticut mobilehome statute and the Santa Barbara ordinance. The Court reviewed *Loretto*, *FCC* and *Fresh Pond*, and then distinguished *Loretto*, pointing out that a mobilehome owner's right to occupy a mobilehome space was originally obtained "consensually" indicating that in entering into such a lease the park owner has transferred his "possessory interest" in the land to the homeowner in return for rents. (*Eamiello*, 546 A.2d at 818.)

The Connecticut Court concluded, based on evidence presented that the

ordinance "protects tenants at mobilehome parks from being forced to sell to park owners at a substantial loss and, as a consequence, benefits many low income people who cannot otherwise afford to purchase a more expensive home." (*Ibid.*)

While recognizing that the state statute which prevented rent increases on transfer might result in the homeowner receiving a greater price for his home than he would otherwise obtain because the right to continue occupancy of the site is transferrable to the purchaser, the court nevertheless upheld the statute, concluding that since the state has created the site value through regulatory scarcity such as zoning restrictions, it could constitutionally repose any sales premium in the homeowner rather than the park owner. (*Id.* at 820.)

The court concluded:

> In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, §21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators. (*Ibid.*)

4. A Mere Loss of Money Is Not A Physical Taking.

In *United States v. Sperry Corp.*, 493 U.S. 52 (1989), this Court held that a statute which required American claimants to pay the United States a

percentage of the monetary awards made by the Iran-United States Claims Tribunal was neither a "taking" nor a violation of the due process clause. This Court's decision reversed the Federal Circuit Court of Appeals which had held that the payment was a "permanent physical occupation" of property and therefore a "per se taking" under *Loretto*. This court explained:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attached to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the

> deduction in this case was physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.
>
> (*Sperry*, 107 L. Ed 2d at 303 n. 9.)

In the case before this Court, there is no physical property that is being occupied due to the ordinance. This distinction makes the case dissimilar to *Loretto*. As in *Sperry*, the impact of the ordinance is limited to the park owner's wallet, in that in the absence of the ordinance, the park owner might have been able to obtain a higher profit.

Since *Sperry* indicates that mere economic loss is not sufficient to constitute a "physical taking", City

submits that the *Hall* panel's decision lacks persuasive effect.

D. THE THIRD CIRCUIT'S DECISION IN *PINEWOOD* IS NOT PERSUASIVE BECAUSE IT FAILED TO CONSIDER BINDING AND RELEVANT AUTHORITIES

On March 7, 1990, the Third Circuit Court of Appeals issued its decision in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3rd Cir. 1990). In that case, the park owner sued in federal court alleging that the rent leveling ordinance of the town was a taking of property because it prohibited the park owner from increasing rents when a mobilehome owner transferred his home to a new homeowner. A Motion to Dismiss was granted by the district court on the basis that the ordinance was a constitutional regulatory ordinance (*Id.* 898 at 350).

On appeal, a Third Circuit panel

reversed, holding that to the extent that the ordinance granted the homeowners a transferable possessory interest in the park owners land, it constituted a "physical taking" under *Loretto*. (*Id.* at 353-354). The fact that the ordinance provided the park owners with a constitutionally adequate rent for the occupancy of the space itself was held not to be adequate in light of the effects of the vacancy control provision.

The *Pinewood* Court apparently never considered that, unlike *Loretto*, a mobilehome owner's right to occupy a mobilehome space is originally obtained "consensually" (*FCC*, 480 U.S. 352); that a park owner transfers his "possessory interest" in his land to the mobilehome owner in return for rents (*Eamiello*, 546 A.2d at 818), and that since the state has created the site value through

regulatory scarcity, it could constitutionally repose any sales premium in the homeowner rather than the park owner. (*Id.* at 820).

The court failed to recognize that the only "property interest" of the park owner which was frustrated by the ordinance was the owner's desire for higher profits and that such an interest is not tantamount to a physical taking. (*See, United States v. Sperry Corp.*, 107 L. Ed 2d 290 at 303 n.9 (1989).)

These flaws in the *Pinewood* Court's conceptual analysis are underscored by the following passage: "Furthermore, if the rather minor intrusion in *Loretto* was deemed a physical invasion then the gross intrusion here must be so classified." (*Pinewood*, 898 F.2d at 353.) It is submitted that the court confused the legal distinction between a regulatory

taking and a physical occupation. Without realizing, or admitting that it was doing so, the court emphasized the amount of harm from the governmental action as the basis for its classification as a physical rather than a regulatory taking.

E. THE *HALL* RATIONALE SHOULD NOT BE EXTENDED

Criticism of the *Hall* decision has been registered by federal district and appellate courts, state courts and commentators. In a concurring opinion in *Sierra Lakes Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991), Judge Goodwin succinctly writes:

> Today we hold that the Rocklin rent control ordinance, as applied, results in a physical taking of private property. We reach this result because the law of the circuit is found in

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Circ. 1987) *cert. den.*, 485 U.S. 940 (1988).

I concur under the compulsion of precedent, but for the record I want to note that I have not forgotten the difference between the physical and the metaphysical. *Hall* reached a commendable legislative result by calling a regulatory ordinance a physical taking. I am in somewhat the same position as I found myself upon first reading *Roe v. Wade*, 410 U.S. 113 (1973), applauding the result but disturbed by the method. Nonetheless, *stare decisis* is a proven policy, and I concur. (938 F.2d at 959.)

The Morgan Hill and Santa Barbara

ordinances are quite different, especially in regard to the creation of what Casella has identified as "secure tenure". A key provision in *Hall* was that the ordinance required mobilehome operators to offer leases of unlimited duration (*Hall*, 833 F.2d at 1273). In a transparent attempt to qualify under *Hall*, Casella alleged that the rent stabilization ordinance grants tenants the right to physically permanently occupy and use the real property of plaintiff. In fact, the language of the City's ordinance lends no support to these allegations. Far from requiring a perpetual lease, the City's ordinance provides an exemption from the rent control ordinance where the parties have entered into a lease.

The state trial court properly found that the *Hall* decision should not be extended beyond its facts and that the

lack of the key allegations relating to the imposition of a requirement of long-term leases was fatal to stating a claim upon which relief could be granted. The City's ordinance standing alone does not "take" any property right held by Casella. The ordinance merely serves to reduce the landlord's income stream, and thus is no different in legal effect from any police power regulation that has the incidental effect of reducing property values.

Unlike the challenged ordinance in *Hall*, the City's ordinance does not require the landlord to give tenants an indefinite lease terminable only for cause. The "secure tenure" which Casella claims is afforded by the operation of the City's ordinance is actually attributable to the California Mobilehome Residency Law, California Civil Code Section 798-799.49. That law limits a mobilehome park

landlord's right to terminate a tenancy and prohibits a landlord from requiring removal of a mobilehome upon sale to a third party. As long as the tenant can afford the rent and doesn't do anything to warrant eviction for cause, his tenancy is secure under State Law. The City's ordinance merely regulates the price to be paid for the rent.

The State Mobilehome Residency Law was enacted to prevent and rectify what were considered to be widespread abuses of the park owners' monopoly status. The statutory right of a mobilehome owner to transfer the leasehold interest to a third party was deemed necessary to avoid the situation where a park owner could require the removal of the mobilehome upon sale, thereby depleting the mobilehome of much of its value by requiring the expenditure of funds to move the coach. At least part

of the "extra" value which mobilehome owners realize upon the sale of their mobile homes when sold in place is attributable to the fact that moving expenses, which can be extremely costly, need not be incurred. There is also a scarcity of available sites for mobile-homes. (See Manheim "Tenant Eviction Protection and the Takings Clause" 1989 Wisconsin Law Review 925 at 955-956 n.179).

The specific facts involved in *Hall*, specifically that the ordinance itself gave tenants the right to a long-term lease, allowed the Ninth Circuit Court of Appeal to more easily bridge the conceptual gap between a regulatory and a physical taking. City's ordinance does not contain such a requirement. It is therefore urged that it is appropriately categorized as a regulatory action for

takings analysis.

F. THE CITY'S RENT STABILIZATION ORDINANCE WAS ENACTED AS A REASONABLE EXERCISE OF THE POLICE POWER TO CONTROL EXCESSIVE RENT INCREASES FOR MOBILEHOME PARK RESIDENTS

Casella's argument that the City's rent ordinance is violative of substantive due process because it allegedly neither substantially advances or rationally relates to a legitimate governmental purpose has no merit. Again it must be pointed out that this new argument based on the Fourteenth Amendment to the United States Constitution was not stated in the complaint, nor was it raised until the Reply Brief stage at the appellate court level.

By enacting the rent stabilization legislation at issue, the City Council sought to remedy an inequitable market

situation caused by the scarcity of mobilehomes and the unique costs associated with moving a mobilehome. The ordinance sought to protect mobilehome owners from unreasonable space rental increases and thereby protect the mobilehome owner's substantial investment in the coach, while also providing park owners with a just and reasonable return on the park owners' investments.

In *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772 (C.D. Cal. 1990), *appeal docketed*, No. 90-55853 (9th Cir. 1991), the district court clearly felt that there was a legitimate state interest in the City of Los Angeles enacting the Rent Stabilization Ordinance ("RSO") including the "vacancy control" provisions. (*Azul Pacifico*, 740 F. Supp. at 780.) The court stated:

Based on testimony from mobile-

> home tenants, the City found that, without vacancy control, it would be virtually impossible for tenants to sell their homes on the pad because landlords could raise the rent to a level that prospective buyers could not afford. (*Ibid.*)

The Court further pointed out that "the Supreme Court has long held that protection of consumer welfare is a legitimate and rational goal of price control" (*Ibid.*), and that rent control has long been held constitutional as "a legitimate exercise of the state's police power" (*Id.* at 781). The Court concluded that "the mobilehome market is an example of a monopoly, which is a market <u>failure</u>, rather than a market, and is a prime candidate for government regulation." (*Ibid.*)

Nevertheless, despite an analysis which seemed to reject the rationale of *Hall* at virtually every turn, the court in *Azul Pacifico* felt itself bound by the controlling *Hall* decision to find a "taking" had occurred. The courts have regularly found rent control legislation to be a reasonable and legitimate means of addressing problems related to scarcity in rental property and the high rents resulting from inequities in bargaining power. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, (1988) upholding rent control ordinance which required consideration of hardship to low income tenants of rent increase).

As pointed out in the *Hall* dissent "significant doubt as to whether a legislative body's goals are in fact achieved is not sufficient to warrant striking down an ordinance ... The

Judiciary does not have the power to sit as a 'superlegislature' second-guessing the wholly economic regulations of State and local governments." (*Hall*, 833 F2d at 1284 [citations omitted], Shroeder, J. dissenting from the denial of en banc hearing. Nelson, J. and Norris, J. concurring.)

It is urged that the City's rent ordinance passes constitutional muster because the Council reasonably concluded that enactment of the ordinance would promote the legitimate State interest of controlling excessive rental prices for the predominately fixed-income residents of the City's mobilehome parks.

CONCLUSION

For the foregoing reasons, City requests that this Court deny the petition for review, or in the alternative, that

the Court grant certiorari and summarily affirm the state court decision. City vigorously opposes Casella's "third alternative" that this Court order the federal district court to take jurisdiction over Casella's claims. This is a Petition for Review of the State Appellate Court decision and the federal district court proceedings are not properly before this Court at this time.

Respectfully submitted,

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